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## GENERAL POWERS AND PERPETUITIES.

IT is a familiar rule that a limitation of a future interest in property that restrains the owner from alienating the property absolutely is not valid unless it is to vest, if at all, within the legally prescribed period from the time when the instrument containing the limitation takes effect. This period is fixed by the duration of a life or lives then in being and twenty-one years afterwards. If the person or persons to whom the limitation is made, or the extent of their interests, are to be ascertained by a subsequent appointment, a literal application of the rule so expressed would make it necessary in all cases to compute the time as if the appointment had been written into the original instrument containing the limitation, for, until the appointment is made, the limitation is incomplete. But, as the object of the law's anxiety against perpetuities is the restraint of alienation, Lord St. Leonards says, "an important distinction is established between general and particular powers."<sup>1</sup> He proceeds as follows:

"By a *general power* we understand a right to appoint to whomsoever the donee pleases. By a *particular power* it is meant that the donee is restricted to some objects designated in the deed creating the power, as to his own children. A general power is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee, which a particular power may also do, but because it enables him to give the fee to whom he pleases; he has an absolute disposing power over the estate, and may bring it into the market whenever his necessities or wishes may lead him to do so. . . . Therefore, whatever estates may be created by a man seised in fee may equally be created under a general power of appointment; and *the period* for the commencement of the limitations, in point of perpetuity, is the time of the *execution* of the power, and not of the *creation* of it."

These views had been previously expressed by Mr. Butler in his notes to Coke upon Littleton,<sup>2</sup> and the only dissent from them

<sup>1</sup> Sugden on Powers (8 ed., 1861), 394, 396.

<sup>2</sup> Coke upon Littleton, 271 b (note 231, VII, 2) ; 379 b (note 330).

came from Mr. Powell in his notes to the 4th edition of Fearn's *Executory Devises* in 1795.<sup>3</sup> He asserted that, where the disposition was merely an exercise of the power, capable of taking effect by virtue of the power only, the principle, "that the uses limited by the power must be such as would have been good, if limited by the original deed," applied with equal force to a general, as to a particular, power; for, if it were otherwise, such general power of appointment might, in the execution of it, have the same tendency to a perpetuity as a particular power. He illustrated this as follows:

"Thus if A. owner of an estate in fee simple in lands, were to limit them to the use of such person or persons (*generally*) for such estate or estates, &c. as he (A.) should appoint, and in the mean time, and subject to such power, to the use of B. in fee; and then A. exercised his power in favour of C. a person unborn at the time of the creation of the power for life, remainder to his first and other sons in fee, so as to make the sons of C. take by purchase, he would thereby be enabled to tie up the property beyond the period of a life in being, and twenty-one years after, computed from the time at which the instrument creating the power bore date."

But he added that the inconvenience of a perpetuity would be avoided where the general power of appointment and the legal estate were vested in the same person by the deed creating the power and limiting the legal estate.

Lord St. Leonards referred to this contention<sup>4</sup> and, after quoting the words of the illustration, observed that

"neither with regard to the limitations themselves, nor to the estate limited in default of appointment, is there any objection whatever on the ground of perpetuity. In regard to the limitations, they are merely such as a man seised in fee might create; and, as the power is equivalent to the fee, the same estates may be created by force of both. To take a distinction between a general power and a limitation in fee, is to grasp at a shadow whilst the substance escapes. By the creation of the power, no perpetuity, not even a tendency to a perpetuity, is effected. The donee may sell the estate the next moment; and when he exercises the power in strict settlement as if he were seised in fee, he creates those estates only which the law permits with reference to the time at which they were raised."

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<sup>3</sup> 2 Fearn, *Executory Devises*, 4 ed., 375, 376.

<sup>4</sup> Sugden on Powers, 395-396.

The law stood in this way until 1869, when a distinction was for the first time made by James, V. C., in respect of a general power exercisable only by will in the case of *In re Powell's Trusts*.<sup>5</sup> A testator had bequeathed £5000 in trust for his daughter, Mrs. Hall, for life and after her death for such persons as she should appoint by will. The daughter by her will appointed the fund upon trust for her daughter (who was unborn at the testator's death) for life, and afterwards for her daughter's children. As to the validity of the trusts after the death of Mrs. Hall's daughter, James, V.C., said:

"A general power to be exercised at death does not constitute ownership. The money was tied up during the whole of Mrs. Hall's life. The rule of perpetuities, therefore, does apply. Where a general power is equivalent to ownership the rule of perpetuities does not apply; but here the money is tied up during the life of the donee."

This is the whole of the judgment upon this point as given in the Weekly Reporter, and the report in the Law Journal is to the same effect more shortly expressed. The only reason mentioned for the decision is that the money was tied up during the whole of Mrs. Hall's life. But that is no reason at all, for the law allows property to be tied up for one life. It might as well be said, if the power had been to appoint by deed after she attained the age of 50 years, that the money was tied up for so many years. If the decision was right, the reasons must be found elsewhere than in the judgment.

The correctness of this decision was attacked in *Rous v. Jackson*,<sup>6</sup> in which the same question arose in 1885 and was examined by Chitty, J. He referred to Sugden on Powers and said: "He draws no distinction between a power exercisable by deed or will or by will only, and it appears to me to make no difference by what instrument the power is made exercisable." He also referred to Butler's note in Coke upon Littleton, and said that he thought there must be some slip in the decision in *In re Powell's Trusts*, and that the case was wrongly decided. The appointment was therefore held to be valid.

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<sup>5</sup> 18 Wkly. Rep. 228; 39 L. J. Ch. 188 (1869).

<sup>6</sup> 29 Ch. D. 521; 54 L. J. Ch. 732; 52 L. T. 733; 33 Wkly. Rep. 773 (1885). The counsel were Rigby Q. C., and Stirling (both afterwards Lord Justices) on one side, and Macnaghten, Q. C., (afterwards Lord Macnaghten) and Whately, on the other side.

Later in the same year in *In re Flower*,<sup>7</sup> the question was again considered by North, J., who said that he should follow the decision in *Rous v. Jackson*, as the observations of Lord St. Leonards in his book on Powers seemed to be exactly in point and to bear out that judgment. He added that, apart from that decision, if he had to decide the question for the first time, without the assistance of any previous decision on the point, he should decide as Chitty, J., did, and not as was decided in *In re Powell's Trusts*.

A few years afterwards the question was again debated at length in Ireland in *Stuart v. Babington*,<sup>8</sup> and Chatterton, V. C., said that he would not, as he might, content himself with saying that he followed the later cases, but he had carefully considered the cases, and his opinion entirely coincided with those of Chitty, J., and North, J.

Mr. Gray, in the first edition of his book on Perpetuities, which was published in the year following the decision in *Rous v. Jackson*,<sup>9</sup> said that the question was not free from difficulty, but, after mentioning that case, submitted that the earlier case of *In re Powell's Trusts*<sup>10</sup> was correct.<sup>11</sup> In the second edition, published in 1906, he says that "*principle* as well as the weight of *authority* seems to be with *Powell's Trusts*."<sup>12</sup>

The former Lord Justice Farwell in his book on Powers,<sup>13</sup> speaking of *In re Powell's Trusts*, says:

"This case however stands *alone*, and has been dissented from by [the judges in the three cases above mentioned]. And on *principle* it is submitted that for the purposes of the rule against perpetuities a general power to appoint by will, following a life interest in the donee of the power,—whether the donee be a man or a married woman,—is equivalent to absolute ownership."

We are therefore led to ask what is the principle, and what are the authorities, by which Mr. Gray considers the decision in *In re Powell's Trusts*<sup>14</sup> to be supported.

<sup>7</sup> 55 L. J. Ch. 200; 34 Wkly. Rep. 149 (1885).

<sup>8</sup> 27 L. R. Ir. 551, 556 (1891).

<sup>9</sup> *Supra*, p. 707.

<sup>10</sup> *Supra*, p. 707.

<sup>11</sup> Gray, *Perp.*, 1 ed., pp. 332, 334, §§ 526, 526 b.

<sup>12</sup> Gray, *Perp.*, 2 ed., p. 412, § 526 b.

<sup>13</sup> Farwell on Powers (2 ed., 1893), 287.

<sup>14</sup> *Supra*, p. 707.

The principal authorities referred to<sup>15</sup> are two English cases, *Wollaston v. King*<sup>16</sup> and *Morgan v. Gronow*,<sup>17</sup> and one Irish case, *Tredennick v. Tredennick*.<sup>18</sup> I have to confess my inability to find anything in these cases that relates to the question. In none of them was there any question whether the validity of interests appointed under a power should be referred to the time of the execution of the power or to the time of its creation. The point determined in each of them was that the power itself was void for remoteness, because it was given to a person that might not be capable of exercising it within the legal period, and therefore no appointment whatever could be made under it. In *Morgan v. Gronow*,<sup>19</sup> which illustrates them all, a fund was appointed, under a special power in a marriage settlement, in trust for each of two daughters of the marriage for life, both being unmarried at the time, and a general power was given to each daughter to appoint by deed the trusts upon which the fund should be held after her marriage, and, subject thereto, a general power to appoint by will was given to her. Lord Selborne held that the power to appoint by will was void, because, as the daughter was not living at the date of the settlement, nothing could vest in her or her representatives or in any one else under an exercise of the power except at a time beyond the legal limit. He also held that the power to appoint by deed was void, because it was to arise only upon marriage, which was an event as uncertain as regards the time at which it might take place as death was. No question therefore arose, or could arise, as to the extent to which the general power to appoint by will might have been exercised, if it had been a valid power.

This was pointed out with great clearness in an article in this Review by Mr. Kales.<sup>20</sup> In a subsequent article written by Mr. Gray<sup>21</sup> in answer to it, no attempt seems to have been made to show how the decision in *In re Powell's Trusts*<sup>22</sup> derives any support from these cases. Mr. Gray, however, says that it is not right to say that the power given to the unborn person was void for

<sup>15</sup> Gray, *Perp.*, 2 ed., p. 412, § 526 a.

<sup>16</sup> L. R. 8 Eq. 165 (1868).

<sup>17</sup> L. R. 16 Eq. 1, 9-10 (1873).

<sup>18</sup> [1900] 1 I. R. 354. This case was decided by Chatterton, V. C., who also decided *Stuart v. Babington*, 27 L. R. Ir. 551; *supra*, p. 708.

<sup>19</sup> *Supra*, p. 707.

<sup>20</sup> 26 HARV. L. REV. 64, 69 (Nov., 1912).

<sup>21</sup> 26 HARV. L. REV. 720 (June, 1913).

<sup>22</sup> *Supra*, p. 707.

remoteness, because remoteness can be attributed only to an estate or interest, and, as a power is neither, remoteness is not properly to be predicated of it. It is true, he says, that no appointment under a power which may be exercised beyond the legal limit is good, but the reason is that the vesting of an interest appointed under a power is subject to the condition precedent of the power being exercised, and, if the power can be exercised beyond the legal limit, the condition may be fulfilled beyond the limit, and therefore the *interest* appointed under the power will be too remote. But whether it is more correct to say that the power was void for remoteness or because it was subject to an impossible condition, these cases only determine that the power was of no effect and that no appointment whatever could be made under it, and they do not touch the question what interests could have been appointed under a valid power given to a living person to appoint by will in any manner that he might think proper.<sup>23</sup>

It is not suggested that there is any other English authority that gives any support to the decision in *In re Powell's Trusts*.<sup>24</sup>

As to the American cases referred to, the principal one is a New York case, *Genet v. Hunt*,<sup>25</sup> in which the validity of a disposition under a general power of appointment by will was referred to the date of the deed creating the power. But the decision proceeded upon the statutes of New York, which had expressly abolished powers as they previously existed and made new provisions regarding them and which had been decided to constitute a complete and exclusive code on the subject.<sup>26</sup> The judgment, after declaring

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<sup>23</sup> It seems to me that it is entirely correct to say, in accordance with the usage, that a power is void for remoteness in such cases (Marsden, *Perpetuities*, 234; 1 *Jarman on Wills*, 6 ed., 390-310), even though remoteness may affect only an estate or interest. A power is only a part of the limitation contained in the instrument creating the power, and is usually so expressed, *e. g.*, as in *Morgan v. Gronow*, L. R. 16 Eq. p. 3, "and after her decease should hold the said investments . . . upon such trusts as she should by will appoint." If the trusts will not necessarily be ascertained by an appointment to be made within the legal period, if at all, this limitation is void for remoteness, and the power, being part of the limitation, falls with it.

<sup>24</sup> *Supra*, p. 707. See also 1 *Jarman on Wills*, 6 ed., 321 (1910); 22 *Halsbury's Laws of England*, 356 (1912).

<sup>25</sup> 113 N. Y. 158, 170; 21 N. E. 91 (1889).

<sup>26</sup> *Cutting v. Cutting*, 86 N. Y. 522, 537 (1881), where it was held that the exercise of a general power of disposition by will did not make the property liable for the payment of the testator's debts, as at common law, because the power, although general, was not absolute according to the statute, which defined an absolute power as

this to be "the rule of our statute," adds that Mr. Jarman explains why this test is not applicable to appointments under general powers at common law, and it then quotes, as a statement "by Mr. Jarman," a passage added by the editor of the fourth edition of Jarman on Wills,<sup>27</sup> which gives the substance of the decision in *In re Powell's Trusts*,<sup>28</sup> Mr. Jarman himself having died nearly ten years before that decision. The judgment also mentions that *Rous v. Jackson*<sup>29</sup> "seems to be adverse" and gives what the judge understood to be the view taken by Mr. Gray as to the error on which this case was supposed to proceed. As the decision of the New York court went entirely upon the statute, these general observations have no special importance.

In Pennsylvania, in *Lawrence's Estate*,<sup>30</sup> the question did not arise, but the judgment contains some dicta that, although the question was not free from doubt, the better opinion seemed to be that the time must be measured from the creation of the power, referring only to *In re Powell's Trusts*, and Mr. Gray's book at § 526. It was held, however, that, assuming this to be the rule, the interests appointed under the power were all valid. In the later case of *Boyd's Estate*<sup>31</sup> some of the interests appointed were held to be invalid, as the persons might not come into being within 21 years after the death of the donee of the power, but the question was not discussed and was apparently decided on the authority of the dicta in the previous case, which was referred to.

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one that enabled the grantee in his lifetime to dispose of the fee for his own benefit and provided that when such a power was given to the owner of an estate for life or years, such estate should be changed into a fee, absolute as to creditors and purchasers. As to other peculiar and arbitrary provisions of the New York statutes relating to estates and remoteness, see Mr. Gray's book, 2 ed., §§ 747, 749.

<sup>27</sup> 1 Jarman on Wills, 4 ed., 5 Am. ed., 290, where the passage is distinguished from the author's work by brackets. The passage was omitted in the 5th ed., 6th Am. ed., p. 261, and another substituted, stating that it had been held that the same principle applicable to appointments under general powers applied where the power was to be exercised by will only, and citing the later cases. In a note it was added that *In re Powell's Trusts*, *contra*, seemed inconsistent with the course of authority. Mr. Jarman died in February 1860 (4 Sol. J. 351; 9 L. Mag. & Rev. 189).

<sup>28</sup> *Supra*, p. 707.

<sup>29</sup> *Supra*, p. 707.

<sup>30</sup> 136 Pa. 354, 364-5; 20 Atl. 521 (1890). In the opinion of the court in this case there is the same mistake in referring to *In re Powell's Trusts* in 37 (instead of 39) L. J. Ch. 188, as there is in Mr. Gray's book, § 526.

<sup>31</sup> 199 Pa. 487, 493; 49 Atl. 297 (1901).

In Maryland, it was laid down in *Thomas v. Gregg*,<sup>32</sup> that it had always been held without question that a limitation under a power of appointment must be construed as if it had been inserted in the instrument creating the power, as regards the rule against perpetuities, and this case, as well as the earlier case of *Albert v. Albert*<sup>33</sup> and the later one of *Reed v. McIlvain*,<sup>34</sup> was decided according to that rule without any suggestion of a possible difference between general and special powers or between general powers exercisable by deed and those exercisable only by will.

The principle upon which Mr. Gray relies, as stated by him in § 526 *b* in the second edition of his book, is that, when the donee of the power can exercise it by either deed or will, he can at any time appoint to himself, and therefore is practically the owner, but, when the power can be exercised only by will, he cannot appoint to himself, for he must die before the appointment can take effect, and therefore he is not practically the owner. He says that an exception to the strict operation of the rule is made in the former case, because the donee can at any time appoint to himself, and that the general rule must govern unless the exception is made out, which is not done unless there be a present right to acquire the present absolute interest. He illustrates the application of the principle by the following example:

"Take, for instance, a devise by A. to B. for life, remainder as B. shall by will appoint, and B. appoints to C., who was not born when A. died, for life, remainder to such of C.'s issue as survive him. . . . Such a gift to C.'s children would be bad."

This is substantially the same example as that used by Mr. Powell,<sup>35</sup> to show that such an appointment to C.'s children under a general power, where there was no restriction as to the manner in which the power should be exercised, would create a perpetuity, unless the legal estate was vested in the same person as the power. But Lord St. Leonards said that there was no perpetuity or tendency to a perpetuity, and that "to take a distinction between a general

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<sup>32</sup> 76 Md. 169, 174; 24 Atl. 418 (1892).

<sup>33</sup> 68 Md. 352, 372; 12 Atl. 11 (1888).

<sup>34</sup> 113 Md. 140, 146; 77 Atl. 329 (1910); referred to in Mr. Gray's article, 26 HARV. L. REV. p. 725, note.

<sup>35</sup> 2 Fearn, Executory Devises, 4 ed., 376; *supra*, p. 706.

power and a limitation in fee is to grasp at a shadow whilst the substance escapes." How, then, is a perpetuity created by the same limitation when it is contained in the will of a person who has a general power to appoint by his will to whomsoever he pleases?

The principle stated by Lord St. Leonards is that whatever estates may be created by a man seised in fee may equally be created under a general power of appointment, and therefore, in point of perpetuity, the time of the *execution* of the power, and not of the *creation* of it, is to be regarded, the law's anxiety against perpetuities being the restraint of alienation.<sup>36</sup> This applies with the same force to a general power of appointment by will, as to a like power of appointment by deed, for every estate or interest that could have been created by the absolute owner may be created by an exercise of the power of appointment by will. The power enables the donee to give the property to any person or for any purpose. He may by his will bring it into the market at once and direct that it be sold for payment of his debts, or he may mix it, or the proceeds, with his own property and put it in the same course of devolution as if it had been actually vested in him as his own property at the time of his death. He may do this so completely that he is said to make the property his own by his will.<sup>37</sup> His power over it is so absolute that, if he exercises the power at all in favor of any person or object, he thereby makes the property to that extent liable for his debts and engagements as if it had been his own, although that result may be contrary to his wishes.<sup>38</sup> It is plain that there is no restraint of alienation, when the power of alienation is so unrestricted.

Mr. Gray has mistaken for a principle a mere incident of the exercise of the power when the donee exercises it by deed in his lifetime. He may then appoint to himself, and he cannot do this by his will, which takes effect only at his death. But this arises from the nature of things and not from any restriction of the power of disposition. When his will takes effect, there is one person less in existence than there was the moment before he died, and that

<sup>36</sup> Sugden on Powers, 395, 396; *supra*, p. 705.

<sup>37</sup> *Coxen v. Rowland*, [1894] 1 Ch. 406, 410, 412; *In re Hadley*, [1909] 1 Ch. 20, 31, 35; *Minot v. Treasurer General*, 207 Mass. 588, 591; 93 N. E. 973 (1911).

<sup>38</sup> *Lord Townshend v. Windham*, 2 Ves. 1, 2, 11 (1750); *Clapp v. Ingraham*, 126 Mass. 200 (1879); Sugden on Powers, 474.

is the only thing that limits his power of appointment, and the death of any other person before the exercise of a power prevents in the same manner an appointment to that person, whether the power is exercisable by deed or will.<sup>39</sup> There is however no restraint of alienation when the power of disposition extends to all persons in existence at the time of the exercise of the power or afterwards born.

There is no statement of the principle that confines it to cases where the power may be exercised by deed or by either deed or will, and in the language used by Lord St. Leonards and Mr. Butler there is no suggestion of a distinction where the power is exercisable only by will. They may use, as examples to illustrate the working of the principle, cases where the power was exercisable by deed as well as by will, but these examples can be readily adapted by a proper change of expression to cases where it is exercisable only by will, in the same manner as they may be adapted to personal property where the words apply, as they generally do, exclusively to real property. When Mr. Butler says<sup>40</sup> that a general power "enables the party to vest the whole fee in himself, or in any other person, and to liberate the estate entirely from every species of limitation inconsistent with that fee," he states a principle that is as applicable to dealing with the property as his own by making it a part of his own estate by his will, as it is to a dealing with personal property. There is no distinction suggested in the one case or in the other. The language used by Lord St. Leonards in his examples does not require change to adapt it to an appointment by will. He says, as regards the donee of a general power, that "it enables him to give the fee *to whom he pleases*; he has an *absolute disposing power* over the estate, and may *bring it into the market* whenever his *necessities or wishes* may lead him to do so," and in another passage, "By the creation of the power no perpetuity, not even a tendency to a perpetuity, is effected.

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<sup>39</sup> Under a power to appoint among children by deed or will, no appointment can be made to a child who dies before an appointment to him, although such an appointment might have been made by deed in his lifetime, and although the consequence is that no provision for the child's family can be made by an appointment to his representatives or his issue (*Duke of Marlborough v. Godolphin*, 2 Ves. 61, 78 (1750); *Butcher v. Butcher*, 1 Ves. & B. 91 (1812); Sugden on Powers, 670).

<sup>40</sup> Coke upon Littleton, 271 b (note 231, VII, 2).

The donee *may sell the estate the next moment.*"<sup>41</sup> These phrases do not mean that the donee may bring the estate into the market, or sell it, at any moment before the power arises. If a power is given to him to appoint in any manner that he pleases after his marriage, or after he attains the age of 50 years, he can bring the estate into the market, or sell it, the next moment after that event, but not before. The language certainly includes these cases.<sup>42</sup> In like manner the donee of a general power exercisable only by will may bring the estate into the market or direct its sale immediately after his will takes effect, and it has long been a common practice for him to do so.<sup>43</sup> If there is a distinction between making the estate his own property the instant before his death, and making it a part of his estate the instant after his death, the distinction is of a most shadowy kind.<sup>44</sup>

It is also insisted in Mr. Gray's article<sup>45</sup> that, if property is given to B. for life, with a general power of appointment by will, and he appoints to his son (who was unborn at the time of the gift) for life, and afterwards to his issue living at his death, the property

<sup>41</sup> Sugden on Powers 394, 396. See *Phipson v. Turner*, 9 Sim. 251 (1838).

<sup>42</sup> See Mr. Kales's article, 26 HARV. L. REV. 66.

<sup>43</sup> 4 Davidson on Conveyancing, 3 ed., 30-33 (common form of will).

<sup>44</sup> At the end of his article (p. 727) Mr. Gray says that, "when English judges and writers speak of a general power, they ordinarily mean powers which can be exercised by deed as well as by will," but he does not mention any instances. I think he is mistaken in this, but no such meaning can be attributed to Lord St. Leonards or to Mr. Butler. They define both a general power and a particular power, and their definition of a general power does not admit any such qualification, and, if it did, then a general power exercisable only by will would not be included in either class of powers. The language of Lord St. Leonards (Sugden on Powers, 394) is set out at the commencement of this article, and that of Mr. Butler is substantially the same. The former also, in the same book, speaking of s. 27 of the Wills Act (which provides that a general devise or bequest of the testator's real or personal estate shall include real or personal estate "which he may have power to appoint in any manner he may think proper," unless a contrary intention appears in the will), says (p. 301): "*General powers* only, therefore, are within the statute, and a general power of disposition is for this purpose deemed equivalent to a fee." It is plain that a general power exercisable only by will is included in these general powers, for a few pages further on (p. 306), he says that, although the expression in the statute, "which he may have power to appoint in any manner he may think proper," is ambiguous, it refers to the *extent* of his power of disposition, and not to the *mode* of appointment, and that it applies although the power is confined to a *will*. It will be observed that, in his definition of a general power, he avoids the ambiguity of the statute and that it is impossible to exclude from it a power to appoint by will only.

<sup>45</sup> 26 HARV. L. REV. 722.

is tied up during the lives of B. and his son, in the same manner as if the power given to B. had been a special power to appoint to his issue. It will be observed that this supposed case of an appointment under a general power is the same as *In re Powell's Trusts*,<sup>46</sup> in which James, V. C., only went so far as to say that the property was tied up during the life of the donee of the power. It is a mistake to go further and to say that it is tied up during the lives of both the donee and his son, because by the general power the donee is enabled to liberate it entirely from all previous limitations and to dispose of it as he pleases. There is nothing that ties the two life estates to one another. But in the case of the special power there is a tie between them, for the donee is only enabled to designate the beneficiaries or their interests within the limits previously marked out by the terms of the power. There is consequently no resemblance between the two cases.

In the same article<sup>47</sup> Mr. Gray, referring to a general power exercisable by deed, asserts with emphasis, indicated by italics, that "*such a power is not really a power at all, but is a direct limitation in fee.*" There is no reference to any authority, which might have given some indication of the sense in which this language was used. If it is taken in its ordinary sense, it is contrary to the commonly received notions on the subject, according to which a general power of appointment by deed does not confer any estate on the donee, and, if it is not exercised, the property does not go as part of his estate on his death, his creditors cannot touch it,<sup>48</sup> and the power cannot be exercised by his will.<sup>49</sup> But, if it is only intended to say that such a power is equivalent to a fee so far as regards the power of disposition in his lifetime, then it is no more than is true of a like power of appointment by will, so far as relates to the power of disposition at his death. One cannot help suspecting that this is all he really does mean, for in another part of the same article<sup>50</sup> he says that what is in form an authority to make a limitation is, in substance, a limitation to the donee in fee, because he can appoint to himself in fee, and, when he appoints to anyone else, the effect is the same as if he had first appointed to himself in fee, and then

<sup>46</sup> *Supra*, p. 707.

<sup>47</sup> 26 HARV. L. REV. 724.

<sup>48</sup> *Holmes v. Coghill*, 7 Ves. 499 (1802); 12 Ves. 206, 214 (1806); Sugden on Powers, 474; 1 Story, Equity Jurisprudence, § 170.

<sup>49</sup> Sugden on Powers, 209.

<sup>50</sup> 26 HARV. L. REV. 720-721.

conveyed to that other person. But all this clinging to the idea of actual ownership leaves out of sight the substance of the matter, which is that, if the person having the power, *without* the ownership, may appoint the property to whomsoever he pleases at the time when he exercises the power, he is in the same position, in respect of perpetuity, as if he were actually the owner.

*J. L. Thorndike.*

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